NO. 20828

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE O. RIVERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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TOPICAL INDEX

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I

JURISDICTIONAL STATEMENT

The appellant, Clarence O. Rivers, was indicted on October 13, 1965 by the Federal Grand Jury for the Southern District of California, Central Division. 1/

This one count indictment charged appellant with theft from an interstate shipment, in violation of Section 659, Title 18, of the United States Code.

The appellant was arraigned and entered a plea of Not Guilty as charged in the Indictment, on October 18, 1965 (C. T. 4).

Trial of this case before a jury began on November 1, 1965,

1/ C. T. 2; C. T. refers to Clerk's Transcript of Proceedings.

before the Honorable Peirson M. Hall (C. T. 16). On November 2, 1965, the jury was charged and, after deliberation, returned a verdict of Guilty as charged in the Indictment (C. T. 17, 18).

Appellant was sentenced to imprisonment for a period of three years by the Honorable Peirson M. Hall, on November 15, 1965 (C. T. 20).

A timely notice of appeal was filed by the appellant on November 26, 1965 (C. T. 23).

The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code.

This Court has jurisdiction under Sections 1291 and 1294, United States Code.

II

STATEMENT OF FACTS

On September 24, 1965, Henry Roybal, a truck driver for the Los Angeles Seattle Motor Express Company, stopped at the Zipp Extract Company on San Pedro Street to pick up a shipment of goods. After loading his truck, he went inside the building to make a telephone call. [2/] While dialing the phone, he saw, through the window, that his truck was beginning to roll (R. T. 32). Mr. Roybal came back outside and noticed that someone was sitting in the cab of the rolling vehicle (R. T. 23). He ran after the truck,

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2/ R. T. 21, 22, 23; R. T. refers to Reporter's Transcript of Proceedings.

caught it, opened the door on the passenger side, and grabbed the steering wheel, twisting the truck to the curb (R. T. 23), while the man behind the steering wheel was striking him and attempting to push him back out of the cab. This man behind the steering wheel was the appellant, Clarence O. Rivers (R. T. 24).

Roybal pulled the appellant out of the truck and held him down on the sidewalk, with the assistance of Clarence Ward, an employee of Zipp Extract who had followed Roybal from the building (R. T. 24, 47), while another man called the police (R. T. 24).

In regard to appellant's alleged intoxication at that time, the Government feels it significant that Rivers' speech was distinct, and that, according to Roybal, "He knew he was doing wrong because he wanted to get away" (R. T. 26).

Furthermore, when the police arrived, Rivers could stand without assistance (R. T. 49).

The police officer who arrived at the scene, Officer Robert A. Wooley, did not consider the appellant to be "drunk" (R. T. 55). Rather, Rivers was coherent and in control of his faculties (R. T. 55). Even though he was handcuffed, the appellant could stand and get into the police car unassisted (R. T. 57, 59).

Only the appellant, testifying in his own behalf, claimed that he was intoxicated at the time and did not remember the alleged offense. Rivers stated that he had been released from jail on the morning of the crime and had eaten no breakfast (R. T. 67). Rivers said he then went to the blood bank and sold a pint of blood (R. T. 67), using the four dollars he received from the blood bank to

purchase wine and vodka (R. T. 69). The last thing the appellant claimed to remember was obtaining a bottle of 7-Up and then awakening in the jailhouse (R. T. 70). He didn't remember anyone sitting upon him or striking anyone (R. T. 75), indeed, he did not even remember the incident as if it were a dream (R. T. 78).

Appellant admitted two prior convictions of the Dyer Act (R. T. 78).

III

ARGUMENT

A. INSTRUCTION NO. 78 FROM CALJIC GIVEN BY THE COURT WAS NOT ERRONEOUS, IN THAT THE COURT FULLY INSTRUCTED AS TO THE EFFECT OF VOLUNTARY INTOXICATION UPON SPECIFIC INTENT.

Instruction No. 10.16 of Federal Jury Practice and Instructions, Mathes and Devitt, 1965, which appellant requested, and which the Court refused to give, reads as follows:

"10.16 Voluntary Intoxication

"Although intoxication or drunkenness alone is not a defense, the fact that a person may have been intoxicated at the time of the commission of a crime may negative the existence of specific intent.

"So, evidence that a defendant acted or failed to act while in a state of intoxication is to be considered in determining whether or not the defendant

acted, or failed to act, with specific intent, as charged.

"If the jury has a reasonable doubt from the evidence in the case whether, because of the degree of his intoxication, the mind of the accused was capable of forming, or did form, specific intent to commit the crime charged, the jury should acquit the accused."

The Government contends that there was no error regarding this in the court below, because Judge Hall instructed as to all of the essential elements contained in the Mathes and Devitt instruction.

Regarding specific intent, the Court instructed:

"With respect to crimes such as charged in this case, specific intent must be proved before there can be a conviction.

"Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

"A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or to disregard the law, may be found to act with specific intent." (R. T. 109).

In regard to the effect of voluntary intoxication upon specific intent, the Court instructed as follows:

"The defendant here has raised the defense of intoxication. With respect to that you are instructed that the law provides that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.

"But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act." (R. T. 113).

And the Court fully instructed the jury regarding reasonable doubt:

"A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt.

"And this rule applies to every material element of the offense charged." (R. T. 105).

"A conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you. And without it being restated

or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions which I give to you." (R. T. 105, 106).

"The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt." (R. T. 109).

Thus, the appellant was not harmed by the Court's refusal to give Mathes and Devitt Instruction No. 10.16, as requested by appellant, since the Court did include in its instructions all the material content of that Mathes and Devitt formula.

The fact that the Court declined to adopt the language of the counsel to the same effect as the instruction given regarding the effect of intoxication upon specific intent, affords no ground of exception.

Tucker v. United States, 151 U.S. 164, 170, 14 S. Ct. 299, 301, 38 L. Ed. 112 (1893).

B. THERE WAS NO ERROR BY REASON OF THE COURT'S REFUSAL TO GIVE APPELLANT'S SPECIAL INSTRUCTIONS NOS. 1 AND 2 RELATING TO THE GIVING OF BLOOD. THE COURT DID NOT REFUSE TO PERMIT TESTIMONY REGARDING THE GIVING OF BLOOD BY THE APPELLANT. THE COURT PROPERLY REFUSED TO ALLOW A CONTINUANCE DURING TRIAL TO PERMIT APPELLANT TO OBTAIN EXPERT TESTIMONY REGARDING THE GIVING OF BLOOD.

The following are the special instructions which Appellant requested and were refused by the court:

Defendant's Special Instruction No. One

"Although loss of blood from a voluntary donation to a blood bank is not a defense, the fact that a person may have suffered after effects from the loss of blood at the time of a commission of a crime may negative the existence of requisite criminal intent.

"So, evidence that a defendant acted or failed to act while suffering after effects from the loss of blood is to be considered in determining whether or not the defendant acted or failed to act with specific intent as charged.

"And if it appears that the accused was suffering from the after effects from the loss of blood in such a degree that his mind was incapable of forming the specific intent required by law to commit the offense charged, the jury should acquit him." (C. T. 14).

Defendant's Special Instruction No. Two

"Evidence that the defendant had after effects from the loss of blood due to a voluntary donation of blood coupled with state of intoxication the defendant was in is to be considered in determining whether the defendant acted while in such a state that his mind was incapable of forming the specific intent required by law to commit the offense charged.

"If it should appear that the accused mind was in such a state of consciousness that his mind was incapable of forming the specific intent required by law to commit the offense charged, then the jury should acquit him." (C. T. 15).

These instructions relate not to law, but to facts, and, therefore, were properly refused. The giving of blood was only one factor to be considered by the jury in determining whether the appellant was too intoxicated at the time of the crime to have formed the requisite specific intent.

If appellant was entitled to an instruction regarding the effect of blood loss upon alcoholic susceptibility, why wouldn't he likewise be entitled to an instruction regarding the effect of not having anything to eat, upon his alcoholic susceptibility? Or, going further, why wouldn't he be entitled to an instruction as to each bottle and kind of beverage he consumed?

These factors were all placed before the jury during the

course of trial and were available for use in determining the issue as to whether appellant was intoxicated in such degree as would negative the existence of specific intent.

The Court did not refuse to allow testimony regarding the giving of blood by appellant. Appellant stated on the witness stand that he had been released from jail on the morning of the alleged crime, and that he had gone to the blood bank and sold a pint of blood (R. T. 67).

Nor did the Court ever refuse to allow expert testimony to be received regarding the effect of the giving of blood upon specific intent. Rather, the Court pointed out:

> "I will say in advance that these instructions here certainly would not be appropriate and proper unless there were some expert testimony here to support the proposition that the giving of blood would have some effect upon a person's intent." (R. T. 37).

Then, when appellant requested in the middle of trial to have a continuance in order to secure such expert testimony, the Court answered, "No. It should have been anticipated." (R. T. 40).

The Government contends that the Court was under no duty o grant a continuance in the middle of trial to permit the appellant o secure expert testimony where the appellant had ample oppor- unity prior to trial to do so.

C. THE COURT OF APPEALS SHOULD NOT REVERSE THE TRIAL COURT FOR THE FAILURE OF LAW ENFORCEMENT OFFICERS TO PERFORM SOBRIETY TESTS AT THE TIME OF ARREST.

Appellant's final contention, unsupported by the citation of any authority, is that a denial of due process was worked in the failure of the arresting officers to perform sobriety tests upon the appellant.

It is not clear from the appellant's opening brief how the failure to give sobriety tests relates to any error of the trial court which the United States Court of Appeals for the Ninth Circuit is now being asked to cure. However, assuming that this argument is directed to some such error in the court below, it should be noted that there is nothing in the record which reflects a request by appellant for a sobriety test at the time of arrest.

Furthermore, it should be noted that appellant was not being arrested for a crime which included intoxication as one of its elements, rather, he was being arrested for stealing a truck.

It appears that appellant claims a constitutional right to a sobriety test on behalf of all suspected intoxicated defendants, regardless of whether they request such a test, and regardless of whether the crime for which they are arrested contains intoxication as one of its elements or as a possible defense.

There is not only no support to be found for the existence of such a right in any statutes or cases but the placing of such a

burden on the prosecution would be contrary to common sense.

CONCLUSION

For the reasons set forth in this brief, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.